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In the Supreme Court of the United States

OCTOBER TERM, 1957

BOYD S. LEEDOM, ET AL., INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS OF AND CONSTITUTING THE NATIONAL LABOR RELATIONS BOARD, PETITIONERS

v.

WILLIAM KYNE, INDIVIDUALLY AND AS PRESIDENT OF BUFFALO SECTION, WESTINGHOUSE ENGINEERS ASSOCIATION, ENGINEERS AND SCIENTISTS OF AMERICA, A VOLUNTARY UNINCORPORATED LABOR ORGANIZATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. ——

BOYD S. LEEDOM, ET AL., INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS OF AND CONSTITUTING THE NATIONAL LABOR RELATIONS BOARD, PETITIONERS

v.

WILLIAM KYNE, INDIVIDUALLY AND AS PRESIDENT OF BUFFALO SECTION, WESTINGHOUSE ENGINEERS ASSOCIATION, ENGINEERS AND SCIENTISTS OF AMERICA, A VOLUNTARY UNINCORPORATED LABOR ORGANIZATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit, issued September 16, 1957, affirming an order of the district court setting aside a Board certification issued to respondent's union.

OPINIONS BELOW

The opinion of the court below (Appendix A, *infra*, pp. 17–20) is not yet reported. The findings, conclu-

sions and order of the district court, also unreported, are set forth at R. 24–32.

JURISDICTION

The judgment of the court below (Appendix A, *infra*, pp. 20–21) was entered on September 16, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether a federal district court has jurisdiction to set aside a certification, issued by the National Labor Relations Board under Section 9 (c) of the National Labor Relations Act, as amended, upon allegations by the labor organization receiving the certification that the Board failed to comply with an explicit statutory requirement in establishing the bargaining unit covered by the certification.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*) and of other relevant statutes are set forth in Appendix B, pp. 22–26, *infra*.

STATEMENT

A. The Board representation proceeding giving rise to this suit

On October 15, 1955, respondent, the president of the Buffalo Section, Westinghouse Engineers Association, Engineers and Scientists of America (hereinafter called the Engineers Association), filed with a

Regional Director of the Board a representation petition under Section 9 of the Act (R. 3–4, 11, 25–26).[1] This petition sought an election for the purpose of certifying the Engineers Association as the exclusive bargaining agent for a unit of about 166 engineering employees in 5 job classifications, working at the Cheektowaga, New York, plant of the Westinghouse Electric Corporation. The 5 classifications were engineer, engineer associate, engineer assistant, engineer senior and engineer fellow (R. 3, 12–13, 25–26). At the hearing, held on March 7 and 8, 1956, before a Board hearing officer, the Engineers Association moved to amend the unit specified in its petition so as to include 5 additional groups of engineers working at the plant, totaling about 67 employees (R. 4, 13, 26).

The Buffalo Salaried Employees Association (hereinafter called the Salaried Employees), which had been permitted to intervene,[2] agreed that the approximately 233 employees whom the Engineers Association sought to represent were professional employees within the meaning of Section 2 (12) of the Act, set forth at p. 22, *infra* (R. 4, 11, 13, 26). It contended, however, that 5 other categories of employees, 14 in number, were similarly professional employees who should also be included in the professional unit. These 5 other categories were engineer order service,

[1] "R" references are to the Joint Appendix filed in the court below.

[2] The Salaried Employees had been certified by the Board in 1946 as the representative for a combined unit consisting of two groups of professional employees and one group of salaried nonprofessional employees (R. 13, n. 5).

engineer test record, engineer contact, order correspondent master, and safety inspector (R. 4, 13, 26). The Engineers Association opposed the inclusion of these other categories in the unit on the ground that they were not professional employees (R. 13).

The Board, on the basis of the record adduced at the hearing, issued its decision on May 28, 1956, directing the holding of a representation election (R. 4–5, 11–18, 26–28). The Board held, as the parties had stipulated, that the 166 employees named by the Engineers Association in its petition, as well as the 67 other engineering employees it later sought to include in the proposed unit, were all professional employees within the meaning of Section 2 (12) of the Act (R. 4; 13, 26–27). The Board further held that none of the 5 categories of employees, 14 in number, whom the incumbent Salaried Employees Association sought to include, were professional employees within Section 2 (12) (R. 4–5, 14–16, 27). However, the Board concluded that the nonprofessional employees occupying the 3 job classifications of engineer order service, engineer test record and engineer contact shared a "close community of employment interest" with the professional engineers;[3] and that, since they consti-

[3] In this connection, the Board noted that these employees had considerable engineering education and engineering experience, were occasionally transferred to the professional engineering categories, worked in the same general area and under common supervision with the professional engineers, collaborated and consulted with the professional engineers, and voted with the professional engineers in the 1946 election (n. 2, *supra;* R. 13–15, 16). On the other hand, in excluding the other employees urged by the Salaried Employees, who were order correspondent masters or safety inspectors, the Board

tuted only 9 employees, their inclusion with the 233 professional employees would not "destroy the predominantly professional character" of the unit proposed for the professional engineer employees (R. 5, 14–16, 27).

In so deciding, the Board concluded that the provisions of Section 9 (b) (1) of the Act[4] did not require it to afford the approximately 233 professional employees a separate self-determination election to determine whether they desired to have the 9 nonprofessional employees included in the same collective bargaining unit. As shown by the cases cited in its decision (R. 16, n. 7), it has consistently been the Board's view that this section was designed to apply only where the professional employees constitute the minority group in a proposed unit, so that a separate self-determination election would be necessary to afford them an effective voice in selecting the bargaining representative.[5] The Board's position is that

noted that they did not share this mutuality of employment interests, and were not included with the engineers in the 1946 election (R. 15–16).

[4] Insofar as relevant here, Section 9 (b) (1) provides:

> *Provided*, That the Board shall not (1) decide that any unit is appropriate for [purposes of collective bargaining] if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; * * *

[5] The original Board decision on this point occurred shortly after Section 9 (b) (1) was added to the Act. *Continental Motors Corp.*, 77 N. L. R. B. 345, 347–348. This decision has been uniformly followed since that time. *Standard Oil Co.*, 107 N. L. R. B. 1524, 1525–1527; *Pacific Gas & Electric Co.*, 98 N. L. R. B. No. 130; *Miller Electric Co.*, 101 N. L. R. B.

Congress did not intend the provisions of this section to empower professional employees to limit the scope of a unit where they constituted a clear majority, as in the instant case, thereby depriving other employees with a close community of employment interests of the most suitable means of exercising their collective bargaining rights.[6]

Accordingly, the Board directed an election in the combined unit of the 233 professional employees and

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1014, 1016; *Potomac Electric Power Company*, 99 N. L. R. B. 219; *Federal Telecommunications Lab., Inc.*, 92 N. L. R. B. 1395, 1396–1399; *Schwarz Laboratories, Inc.*, 89 N. L. R. B. 930, 931–932; *Westinghouse Electric Corp.*, 89 N. L. R. B. 8, 29, 34; *Boeing Airplane Co.*, 86 N. L. R. B. 368, 371; *Squibb & Sons*, 83 N. L. R. B. 792; *Westinghouse Electric Corp.*, 80 N. L. R. B. 591, 594–595. In 1948, Congress was apprised of the Board's construction of Section 9 (b) (1) of the Act, by Chairman Paul M. Herzog. See Hearings before the Joint Committee on Labor-Management Relations, 80th Cong., 2d Sess., pp. 1147–1148. Congress was also apprised of this construction in 1949 and 1950. Thirteenth Annual Report of the National Labor Relations Board, p. 40, n. 19; Fourteenth Annual Report of the National Labor Relations Board, p. 38.

[6] Thus, the Senate Report, explaining the objective of the provision which became Section 9 (b) (1), states that it was aimed at the Board's past practice of "covering professional personnel into general units of production and maintenance employees or general units of office and clerical employees," a practice which tended to obscure the special interests of the professionals since "their number is always small in comparison with production or clerical employees" (1 Leg. Hist. of the Labor Management Relations Act, 1947 (G. P. O., 1948), p. 417). See also, 1 Leg. Hist., 1947, pp. 62, 327–328, 540; 2 Leg. Hist., 1947, pp. 61–1077; Hearings before the Senate Committee on Labor and Public Welfare on S. 55, *et al.*, 80th Cong., 1st Sess., pp. 1702–1712.

the 9 closely allied nonprofessional employees. The unit was described as follows (R. 5, 17–18; 27–28):

> All professional employees, including the categories of engineer assistant, engineer associate, engineer, engineer senior, engineer fellow, manufacturing engineer, manufacturing engineer senior, plant layout engineer, methods engineer (formerly time and motion analyst), purchasing engineer, engineer order service, engineer test record, and engineer contact, but excluding the categories of machine designer, order correspondent master, and safety inspector, all other employees, guards, and supervisors as defined in the Act.

The employees were afforded the choice of selecting the Engineers Association, the Salaried Employees Association, or neither, as their bargaining representative (R. 5, 17–18, 28).

On June 14, 1956, an election by secret ballot was conducted among the employees in this unit (R. 6, 19, 29). In the election, a majority of the employees designated the Engineers Association as their collective bargaining representative; the Engineers Association received 126 of the 228 votes cast (R. 6, 21–22, 29). Thereafter, on June 21, 1956, the Engineers Association was certified as the exclusive bargaining agent of the unit described in the Board's direction of election (R. 6, 19–20, 29).

B. The instant suit

On July 12, 1956, respondent, president of the union certified by the Board, instituted this suit in the district court for the purpose of having the certifi-

cation reviewed and set aside. The jurisdiction of the court was sought to be predicated on 28 U. S. C. 1337 and Section 10 of the Administrative Procedure Act, 5 U. S. C. 1009 (R. 2). The gravamen of the complaint was that the Board "exceeded the scope of [its] statutory authority" and "failed and refused to comply with Section 9 (b) (1) of [the] Act" (R. 7–8), by determining that a unit composed of 233 professional employees and 9 nonprofessional employees was appropriate for the purpose of collective bargaining, without first affording the professional engineering employees a separate election to determine whether or not they desired to be included with the nonprofessional employees.

The Board moved to dismiss the complaint or, in the alternative, for summary judgment in its favor, on the grounds that the district court was without jurisdiction of the subject matter and that the complaint failed to state a claim warranting judicial relief. Respondent thereafter filed a cross-motion for summary judgment in his favor (R. 20–21, 23).

On December 3, 1956, the district court denied the Board's motion and granted respondent's motion for summary judgment (R. 23). The court held that it had jurisdiction to review the Board's representation determination, that Section 9 (b) (1) of the Act was applicable, and that the Board exceeded its statutory authority in failing to afford the professional employees a separate self-determination election (R. 30). The court entered an order (R. 31–32) which directs the Board to set aside and vacate the prior election and certification, and to further process the repre-

sentation petition filed by the Engineers Association. At the same time, the order restrains the Board from finding a unit including both professional employees and non-professional employees to be appropriate for purposes of collective bargaining without first affording the professional employees a self-determination election.

The Board appealed to the court below. Without contesting the district court's interpretation of Section 9 (b) (1), the Board contended that Congress intended to preclude review of Board representation determinations except to the limited extent provided in Sections 9 (d) and 10 (e) and (f) of the Act, *i. e.*, where the determination had become the basis for an unfair labor practice order and that order was before the Court of Appeals for review or enforcement. On September 16, 1957, the court below affirmed the decision of the district court, holding that "review by way of § 10 is too remote and conjectural to be viewed as providing an adequate remedy" in this case (*infra*, pp. 19–20).[7] It went on to conclude that the repre-

[7] The Board had contended that the union conceivably could have obtained review of the certification under the statutory review procedure. That is, the union could have refused to bargain with the Company except for a unit of only professional employees, thereby subjecting itself to a charge that it had violated Section 8 (b) (3) of the Act. Were the Board then to issue an order requiring the union to bargain in the unit covered by the certification, the union could obtain review of that order and the underlying certification under Sections 9 (d) and 10 (e) or (f) for, when such an order is brought to the Court of Appeals upon a petition for review or enforcement, the validity of the representation determination itself is open to full judicial review. *May Department Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376.

sentation determination could be reviewed by an original equity suit in the federal district court, since the issue presented was not "in the wide area of determinations which depend on the Board's expertise and discretion," but entailed "Board violation of a statutory requirement and resulting injury" (*infra*, pp. 18–19).

REASONS FOR GRANTING THE WRIT

1. The holding of the court below that a Board representation determination may be reviewed by an independent equity suit in the federal district court, where no other feasible method of review is available and the determination involves "Board violation of a statutory requirement," presents a substantial and important question which has twice been reserved by this Court. In *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, the Court concluded that a Board certification was not a "final order" and thus not directly reviewable in the Court of Appeals under Section 10 (e) or (f) of the Act. It noted, however, that it was not deciding whether the certification could be reviewed by an original suit in the district court under § 24 of the Judicial Code (now 28 U. S. C. 1337), as this question could be "appropriately answered only upon a showing in such a suit that unlawful action of the Board has inflicted an injury on the petitioners for which the law, apart from the review provisions of the Wagner Act, affords a remedy" (*id.*, at 412). The question was again presented, more directly, in *Inland Empire District Council* v. *Millis*, 325 U. S. 697, where a certification was sought to be reviewed by an action instituted in the

district court. Concluding that no showing had been made that the Board had departed "from statutory requirements or from those of due process of law," the Court sustained the dismissal of the complaint without reaching the question whether the district court had jurisdiction to review a Board certification. The Court, repeating the earlier view expressed in the *American Federation of Labor* case, *supra*, stated that it would be inappropriate to decide the jurisdictional question in the absence of "some showing that the Board has acted unlawfully" (*id.* at 700).

The instant case satisfies this requirement, since the court below accepted the district court's conclusion that the Board action was contrary to Section 9 (b) (1) of the Act, and further found that the review provisions of the Act itself afforded respondent no adequate method of obtaining review of the certification. Accordingly, the jurisdictional issue previously deferred by this Court is ripe for adjudication here.*

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*The Board's petition for certiorari in *Farmer* v. *United Electrical Workers*, No. 597, October Term, 1953, which was denied by the Court (347 U. S. 943), presented the jurisdictional question, but not, as here, in the context of a typical representation case. Thus, in *United Electrical*, certain unions, in danger of losing their compliance status under Section 9 (h) of the Act, as a result of a Board administrative investigation into the veracity of the non-Communist affidavits filed by some of their officers, brought suit in a federal district court to enjoin the Board inquiry on the ground that it was beyond the Board's powers. The district court agreed with the union's contention and issued an injunction, which was sustained by the Court of Appeals (211 F. 2d 36). The Board then petitioned for certiorari raising two questions: (1) whether the Board had power to investigate the veracity of affidavits filed

2. The question presented here, as the Court recognized in its *Inland Empire* opinion, is of "obvious importance" in the administration of the Act (325 U. S. 699).[9] Moreover, the holding of the court below is in direct conflict with the decisions of other courts of appeals.

Thus, both the Second and the Fourth Circuits have concluded that the scheme of the Act and its legislative history (discussed *infra*, pp. 14–15) show that Congress intended to preclude review of Board representation determinations except to the extent provided in Section 9 (d) of the Act, *i. e.*, when the determination has become the basis for an unfair labor practice order and that order is before the Court of Appeals for review or enforcement under Section 10 (e) or (f). Hence, they have concluded

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pursuant to Section 9 (h); and (2) whether the district court, in any event, had jurisdiction to review the Board's administrative action (Petition in No. 597, October Term, 1953, p. 2).

In these circumstances, we submit that the denial of certiorari in *United Electrical* clearly does not affect the propriety of the instant petition. For, since *United Electrical* did not involve review of a particular Board representation determination, but rather action which the Court of Appeals described as wholly "preliminary" to any unfair labor practice case or representation proceeding (211 F. 2d at 40), the considerations which, as we show, pp. 14–15, *infra*, led Congress to preclude direct review of a Board representation determination were not necessarily applicable to the situation there presented.

[9] Representation cases are by far the biggest proportion of the Board's total caseload (see Twenty-first Annual Report of the National Labor Relations Board, pp. 163, 169), and the decision of the courts below greatly enlarges, and indeed removes any practical limitation on the number of such cases which could be subjected to direct review in the district courts (see pp. 15–16, *infra*).

that the Act, like the Railway Labor Act with respect to the analogous representation determinations of the National Mediation Board (see *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297), deprives the district courts of jurisdiction to review Board representation determinations. In short, contrary to the court below, the Second and Fourth Circuits have held that a Board representation determination may not be reviewed in a federal district court, not only where the exercise of Board discretion is at issue, but also where questions of the Board's legal power are involved. *Fitzgerald* v. *Douds*, 167 F. 2d 714, 716–717 (C. A. 2); *Madden* v. *Brotherhood*, 147 F. 2d 439, 442–445 (C. A. 4).[10] See also, *International Union of Operating Engineers, Local No. 148* v. *International Union of Operating Engineers, Local No. 2*, 173 F. 2d 557, 559 (C. A. 8); *Housewright* v. *Hull*, 104 F. Supp. 234 (N. D. Ohio); *M. E. S. A.* v. *Schauffler*, 103 F. Supp. 130 (E. D. Pa.).

In view of the importance of the question, this conflict in decisions requires resolution by this Court.

3. The holding of the court below is erroneous. As previously noted, the Act, although providing for judicial review of Board orders (Section 10 (e) and (f)), provides for review of a representation determination only in the circumstance specified in Section

[10] The only exception recognized under these holdings is where the Board representation determination presents a substantial constitutional question. *Fay* v. *Douds*, 172 F. 2d 720, 723 (C. A. 2). This is because, as pointed out in *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 301, "constitutional questions aside, it is for Congress to determine how the rights it creates shall be enforced."

9 (d) (*supra*, p. 12). "In such a case the specification of one remedy normally excludes another." *Switchmen's Union* v. *National Mediation Board*, 320 U. S. at 301. Moreover, the legislative history of both the original and amended Acts discloses that Congress extensively considered and specifically rejected proposals which would have permitted direct review of representation determinations. Consciously balancing the advantages of permitting direct review against the disadvantages—especially the likelihood that direct review would result in dilatory tactics in representation proceedings—Congress explicitly determined, in the original Act, to preclude such review.[11] In 1937, Congress was asked to reconsider the question of judicial review of Board representation determinations and again rejected proposals to permit such review, declining to change the limited review provisions of Section 9 (d).[12]

The problem was again considered by Congress in 1947, when it enacted the Taft-Hartley amendments to the Act. Section 10 (f) of the House bill, following the 1937 proposal, provided for direct review by the Courts of Appeals of Board certifications (H. Rep. No. 245, 80th Cong., 1st Sess., pp. 43, 59–60, 1 Legislative History of the Labor Management Relations

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[11] See S. Rep. No. 573, 74th Cong., 1st Sess., pp. 5–6, in 2 Leg. Hist. of the National Labor Relations Act, 1935 (G. P. O., 1935), p. 2305; H. Rep. No. 1147, 74th Cong., 1st Sess., p. 7, 2 Leg. Hist., 1935, p. 3053.

[12] See Hearings before the Senate Committee on Education and Labor on S. 1000, *et al.*, 76th Cong., 1st Sess., pp. 460–463, 584–585; *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, 409–411; *Madden* v. *Brotherhood*, 147 F. 2d 439, 443–444 (C. A. 4).

Act, 1947 (G. P. O., 1948), pp. 334, 350-351). Opponents of this proposal argued, however, that to permit direct review of Board certifications would have serious adverse consequences on collective bargaining, by tending to encourage litigation at the certification stage of Board proceedings. See H. Min. Rep. No. 245, 80th Cong., 1st Sess., p. 94, 1 Leg. Hist., 1947, p. 385. In conference, this provision was eliminated, and it was decided to retain the limited review provided in Section 9 (d) of the original Act. H. Conf. Rep. No. 510, 80th Cong., 1st Sess., pp. 56–57, 1 Leg. Hist., 1947, pp. 560–561. Senator Taft explained that, in conference, "the House yielded to the view of the Senate conferees that such provision would permit dilatory tactics in representation proceedings" (93 Cong. Rec. 6444, 2 Leg. Hist., 1947, p. 1542).

With respect to the question of direct judicial review, there is no validity to the distinction, made by the court below, between a representation determination which entails the exercise of Board expertise or discretion and one which, as here, involves the application of a specific statutory requirement (Appendix A, pp. 18–19, *infra*). Direct judicial review of Board representation determinations involving the application of statutory rules affects the length of time in finally resolving representation cases, and thus nullifies the Congressional objective outlined above, no less than direct review of "discretionary" determinations. Moreover, since the Board clearly has no statutory authority to act in an arbitrary and capricious manner, virtually every Board determination in a representation proceeding could be cast in terms of an

alleged excess of statutory authority, thereby completely circumventing Congress' intention to limit the reviewability of such proceedings."[13]

CONCLUSION

For the reasons stated, this petition for certiorari should be granted.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

JEROME D. FENTON,
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Associate General Counsel,
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Assistant General Counsel,
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National Labor Relations Board.

DECEMBER 1957.

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[13] The reviewability of the Board's representation determinations is not enlarged by the Administrative Procedure Act (5 U. S. C. 1001, *et seq.*). Section 10 thereof expressly excepts from its judicial review provisions the situation where: "(1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion." See *International Union of Operating Engineers, Local No. 148* v. *International Union of Operating Engineers, Local No. 2*, 173 F. 2d 557, 559 (C. A. 8); *Fay* v. *Douds*, 78 F. Supp., 703, 705 (S. D. N. Y.), affirmed, 172 F. 2d 720 (C. A. 2); *White* v. *Herzog*, 80 F. Supp. 407, 411 (D. D. C.); Attorney General's Manual on the Administrative Procedure Act (U. S. Dept. of Justice, 1947) pp. 94–95.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13701

BOYD S. LEEDOM, ET AL., individually and as Chairman and Members of and Constituting the NATIONAL LABOR RELATIONS BOARD, APPELLANTS

v.

WILLIAM KYNE, individually and as President of Buffalo Section, WESTINGHOUSE ENGINEERS ASSOCIATION, ENGINEERS AND SCIENTISTS OF AMERICA, a voluntary unincorporated Labor Organization, APPELLEE

Appeal from the United States District Court for the District of Columbia

Decided September 16, 1957

Before BAZELON, BASTIAN and BURGER, Circuit Judges.

BAZELON, *Circuit Judge:* Appellee, President of the Westinghouse Engineers Association,[1] brought this suit against appellant members of the National Labor Relations Board to set aside a certification under § 9 of the National Labor Relations Act. The unit certified consisted of 233 admittedly professional employees, within the meaning of § 2 (12) of the Act, whom the Engineers Association had sought to represent;

[1] The full name of this organization is Buffalo Section, Westinghouse Engineers Association, Engineers and Scientists of America.

and 9 others, admittedly non-professional, whom the Board included, over objection of the Engineers Association, because they share a "close community of employment interest" with the professionals and their inclusion would not "destroy the predominantly professional character" of the unit. The District Court, however, agreed with the Engineers Association that inclusion of these non-professionals violated § 9 (b) which provides, in pertinent part, "that the Board shall not (1) decide that any unit is appropriate for [purposes of collective bargaining] if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit." Accordingly, on cross motions, the court granted summary judgment in favor of appellee and against appellants.

On this appeal, as in the court below, the Board takes the familiar position that, under § 9 (d), its determinations in representation proceedings are reviewable only in the courts of appeals and only when they have become the basis for a "final order" in an unfair labor practice proceeding under § 10. It relies heavily on *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297 (1943).

"Before we can decide whether these proceedings are reviewable in an original equity suit in the District Court, there must be a showing 'of unlawful action by the Board and resulting injury . . . by way of departure from statutory requirements or from those of due process.' *Inland Empire District Council, etc.* v. *Millis,* 1945, 325 U. S. 697, 700, 65 S. Ct. 1316, 89 L. Ed. 1877." *DePratter* v. *Farmer,* 98 U. S. App. D. C. 74, 76, 232 F. 2d 74, 76 (1956). Equitable relief is clearly barred in the wide area of determinations which depend on the Board's expertise

and discretion; as for example, in *Switchmen's Union*, that railroad yardmen should be included in a unit with certain other smaller groups of railroad employees, or, in *DePratter*, that full time production employees should be included in a unit with employees who devote only part time to production and the rest to other tasks.

This case, however, presents "a different 'type of problem.'"[2] Section 9 (b) (1) expressly forbids inclusion of professionals and non-professionals in the same bargaining unit "*unless* a majority of [the] professional employees vote for inclusion in such unit." It is clear that this provision was intended to protect the professionals; that the professionals' right to this benefit does not depend on Board discretion or expertise; and that denial of this right must be deemed to result in injury. Thus this case presents Board violation of a statutory requirement and resulting injury.

Whether, granting the availability of a § 10 remedy, the injury flowing from the violation of § 9 (b) (1) would support equitable relief need not be decided. Here review by way of § 10 is too remote and conjectural to be viewed as providing an adequate remedy. *Farmers* v. *United Electrical, Radio & Machine Workers*, 93 U. S. App. D. C. 178, 211 F. 2d 36 (1953). Since the employer is not aggrieved by the Board's inclusion of the nine non-professionals, he cannot be relied upon to refuse to bargain and thus make it possible for the Association to bring a reviewable § 10 proceeding. Nor is it likely that an Engineers Association refusal to bargain for the nine non-profes-

[2] *Air Line Dispatchers Ass'n* v. *National Mediation Board*, 89 U. S. App. D. C. 24, 27, 189 F. 2d 685, 688 (1951); see also *Farmer* v. *United Electrical, Radio & Machine Workers*, 93 U. S. App. D. C. 178, 211 F. 2d 36 (1953), *cert. denied*, 347 U. S. 943 (1954); *Leedom* v. *International Union*, 352 U. S. 145 (1956).

sionals would induce the employer to seek review since he would then be free to deal with all employees individually. Nor could we expect such refusal to induce any of the nine non-professionals to seek review. They are hardly likely to insist upon placing their fate in the hands of a reluctant bargaining representative.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

APRIL TERM, 1957

No. 13,701

BOYD S. LEEDOM, et al., individually and as Chairman and Members of and constituting the NATIONAL LABOR RELATIONS BOARD, APPELLANTS

v.

WILLIAM KYNE, individually and as President of Buffalo Section, WESTINGHOUSE ENGINEERS ASSOCIATION, ENGINEERS AND SCIENTISTS OF AMERICA, a voluntary unincorporated Labor Organization, APPELLEE

Appeal from the United States District Court for the District of Columbia

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Before BAZELON, BASTIAN, and BURGER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated September 16, 1957.

Per Circuit Judge BAZELON.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), are as follows:

SEC. 2. When used in this Act—

* * * * *

(12) The term "professional employee" means—

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

* * * * *

SEC. 9. (b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes

both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

* * * * * *

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * * * * *

SEC. 10. (e) The Board shall have power to petition any United States court of appeals (including

the United States Court of Appeals for the District of Columbia), or if all the United States courts of appeals to which application may be made are in vacation, any district court of the United States (including the United States District Court for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was

alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * *

Section 1337 of the Judicial Code (28 U. S. C.) provides as follows:

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

Section 10 of the Administrative Procedure Act (5 U. S. C. 1009) provides in relevant part as follows:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) *Right of review.*

Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

* * * * *